No. 87-1729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CAPLIN & DRYSDALE, CHARTERED,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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The Solicitor General's brief in opposition is a curious document. Rule 22.1 of this Court's Rules states that a brief opposing certiorari should "disclos[e] any matter or ground why the cause should not be reviewed by this Court." The Government's submission reads more like a brief on the merits, for it devotes a scant page to the discretionary factors that affect this Court's decision at the certiorari stage. We will focus in this reply on those discretionary factors, then briefly address the Government's merits argument.

1. The Government concedes (Br. in Opp. 9) that a conflict among the circuits existed, at least on the statutory question, at the time we filed our petition.

The Government points out, however, that two of the decisions on which we predicated the conflict—*United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), and *United States v. Jones*, 837 F.2d 1332 (5th Cir. 1988)—have been vacated by their respective courts *en banc*. Given the pendency of these rehearings *en banc*, the Government asserts that there is now "no conflict among the circuits and thus no need for review by this Court" (Br. in Opp. 9).

Contrary to the Government's assertion, a conflict among the circuits still exists, since the Fifth Circuit has not vacated its prior decision in *United States v. Thier*, 801 F.2d 1463 (1986), *modified*, 809 F.2d 249 (1987), which likewise conflicts with the decision below. *See* Pet. 10-11. Although this conflict concededly has been placed in a state of some suspense by the Fifth Circuit's grant of *en banc* review in *Jones*, we believe that the questions presented here are sufficiently important to warrant this Court's attention now, without awaiting the outcome of the two *en banc* proceedings. *See* pages 3-5, *infra*. But if the Court disagrees with our submission in this respect, it should at least hold our petition pending the outcome of those cases. The Government's suggestion that certiorari be denied in these circumstances seems manifestly unfair, since we have timely identified a circuit conflict that may well persist despite the pending rehearings *en banc*.[1]

[1] The Government has previously urged the Court to hold a petition in circumstances like these. In *Dubose v. Pierce*, No. 85-516, petitioner pointed to a conflict with the Ninth Circuit's decision in *Underwood v. Pierce*, 761 F.2d 1342 (1985). The Government filed a memorandum in *Dubose* acknowledging the conflict but noting that the conflict "may disappear" in view of

2. The Government does not dispute—indeed, it does not address—our contentions (Pet. 22-26) as to the importance of the questions presented. The pressing nature of these questions is underscored by the American Bar Association in its *amicus curiae* brief urging that certiorari be granted. Within a recent three-month period, no fewer than four courts of appeals—the Second, Fourth, Fifth, and Tenth Circuits—have grappled inconclusively with attorney fee forfeiture. The federal district courts, which must routinely encounter questions about how criminal defendants shall be represented, have adopted equally disparate stances.

As the ABA points out, moreover, the number of litigated cases, large though it is, opens but a small window on the problem. "Attorneys in private practice must confront on a daily basis the ethical and professional dilemmas now attendant upon the acceptance of compensation in criminal cases" (ABA Am. Br. 6). In literally every case in which a RICO or CCE count is foreseeable or charged, the prospect of fee forfeiture will adversely affect attorneys' performance and defendants' ability to secure private counsel. As we noted in our petition (at 22), the decision below may prevent targets of a criminal investigation from being represented by *any* counsel during grand jury proceedings—a point that the Government has not disputed.[2]

the Government's subsequent petition for rehearing in *Underwood*. Br. for Res. in No. 85-516, at 6. The Government accordingly urged the Court to hold the *Dubose* petition pending the outcome of the *Underwood* rehearing. *Ibid.* The Court did so, eventually granting the Government's petition in *Underwood*. *See Pierce v. Underwood*, No. 86-1512 (argued Dec. 1, 1987).

[2] The Government suggests in a footnote (Br. in Opp. 22 n.10)

As this Court has observed, the " 'Sixth Amendment guarantees the accused * * * the right to rely on counsel as a 'medium' between him and the State.' " *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). Attorney fee forfeiture poses a serious threat to the independence of the defense bar and to our adversarial system of justice. Because it may be many months before the pending *en banc* proceedings are concluded—reargument in *Jones* is not scheduled until September—this Court should act now to resolve the questions presented in the petition.

3. The Government repeatedly reminds the Court that the predicate offenses of the CCE count here were "illegal drug activities" (Br. in Opp. 11, 16, 19, 20). As we note in our petition, however, the reach of the forfeiture statute is by no means coterminous with the Nation's war against narcotics. The principle established by the decision below will extend through the RICO statute to a variety of white-collar criminal prosecutions. The expansive reach of fee forfeiture is illustrated by recent press reports about the difficulties experienced by E. Robert Wallach in retaining a

that the situation is less dire than we contend, stating that the Justice Department "has promulgated internal guidelines to assure that the forfeiture provisions are invoked with caution where they may have an effect on fees paid to attorneys." But these guidelines require advance approval from the Criminal Division only when an indictment seeks forfeiture of assets already in the hands of an attorney. No such caution is required in the more common situation where the indictment seeks blanket forfeiture of assets in the defendant's hands, even though such an indictment will have an equally severe impact on the defendant's ability to hire counsel. In any event, these guidelines lack the force of law and may be changed at any time.

lawyer when, after being indicted on RICO charges for his role in the Wedtech affair, the bulk of his assets were frozen by a temporary restraining order. *See* Nat'l L. J., Apr. 4., 1988, at 2; Am. Law., June 1988, at 3. Contrary to the Government's suggestion, therefore, the defendant's status as a drug dealer cannot be used to minimize the importance of the questions presented here.

4. The Government suggests (Br. in Opp. 9, 20-21) that "this case is not a suitable vehicle" for considering the propriety of attorney fee forfeiture, noting that the instant challenge is raised, not by a defendant in a pre-trial setting, but by a law firm seeking recovery in a post-conviction proceeding. The precise nature of the Government's objection is unclear. The court of appeals explicitly held that "Caplin & Drysdale is * * * a proper party to assert Sixth Amendment objections to fee forfeiture" and that both the statutory and the constitutional questions are squarely presented here. Pet. App. 7a-8a. The Government in opposing certiorari does not challenge these holdings; to the contrary, it devotes thirteen pages of its brief to discussion of the merits. It may be that a law firm in a post-conviction setting occupies a less sympathetic position than does a defendant who contends, prior to trial, that the Government's forfeiture allegations prevent him from hiring a lawyer. But that has nothing to do with this Court's jurisdiction to hear, or its ability to resolve, the important questions presented by our petition.[3]

[3] Indeed, this case is in some respects a preferable vehicle for addressing these issues. Given the exigencies of criminal trial schedules, pre-trial challenges to attorney fee forfeiture will often

5. The Government errs in contending (Br. in Opp. 18-19) that its position is buttressed by this Court's recent decision in *Wheat v. United States*, No. 87-4 (May 23, 1988). The Court in *Wheat* unequivocally held that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment" (56 U.S.L.W. at 4443). The Court ruled, however, that the "Sixth Amendment presumption in favor of counsel of choice" may be "overcome * * * by a showing of a serious potential for conflict [of interest]" on the part of the defendant's chosen counsel (*id.* at 4443, 4444). The Court stressed that the conflicts potentially created by a lawyer's representation of multiple defendants jeopardize "[n]ot only the interest of [the] criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases" (*id.* at 4443).

In the instant case, all the considerations advanced in *Wheat* to support denial of the defendant's counsel of choice point exactly the other way. First, any attorney willing to represent a defendant faced with

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wash out before they reach this Court. Such challenges, moreover, will often involve—as was true in *Monsanto*, *supra*—the alleged need for a pre-trial mini-hearing at which the Government will have the burden of proving the likelihood of forfeiture. Before undertaking to define the contours of such a proceeding, it makes sense to delimit the showing that a claimant must make at the post-conviction hearing required by 21 U.S.C. § 853(c) and (n)(6). We contend that an attorney can qualify as a "bona fide purchaser" by showing the absence of sham or fraud; the Government contends that an attorney must demonstrate ignorance of the illicit source of his client's funds. To opine on the need for a pre-trial hearing before deciding this fundamental statutory question, to say nothing of the basic constitutional question, would put the cart before the horse.

broad forfeiture counts will confront a "serious potential for conflict" (56 U.S.L.W. at 4444) between his obligation faithfully to represent his client and his desire to retain his fee. *See* Pet. 23-24. Second, since the issuance of an indictment with a broad forfeiture count will, in the Government's view, put defense counsel on notice that his client's assets are forfeitable, an ethical lawyer who has represented his client throughout the grand jury proceedings may be forced to resign (or be disqualified on the Government's motion because of a potential conflict under *Wheat*), thereby substantially impairing the quality of the client's defense and "the institutional interest in the rendition of just verdicts in criminal cases" (56 U.S.L.W. at 4443). Third, whereas the counsel-of-choice issue in *Wheat* was limited to whether *a particular lawyer* could represent the defendant, the impact of fee forfeiture will be to eliminate, at the discretion of the prosecutor, *the entire universe* of ethical retained counsel. As the panel in this case noted (Pet. App. 63a), the effect of the Government's including a broad forfeiture count in a CCE or RICO indictment is the same as if Congress had passed a law dictating what lawyers a defendant might retain, or placing a cap on the fee that his chosen lawyer might be paid.

6. On the merits, the Government's position is marred by the same question-begging approach that infected the reasoning of the *en banc* court below. The Government pitches its argument squarely on the statute's "relation back" provision, asserting that a defendant ceases to own his assets at the moment he performs an act subsequently alleged to be a crime (Br. in Opp. 11, 13, 18, 19). Since paupers have no

right to counsel of choice, the Government reasons, a person facing forfeiture is no different from any other indigent defendant who may permissibly be forced to rely on court-appointed counsel.

What the Government's brief assiduously ignores is that the forfeiture provisions are explicitly *penal* in nature and attach only upon the defendant's conviction of the underlying crime. 21 U.S.C. § 853(a); 18 U.S.C. § 1963(a). Absent conviction, the property sought to be forfeited does not vest in the Government, regardless of how illegitimately the defendant may have employed his wealth.[4] Thus, as we contend in our petition (at 20-22), the "relation back" provision is properly viewed as a mechanism for preventing fraudulent conveyances of the defendant's assets, not as a device for determining true title to property.

The Government's argument likewise ignores its own responsibility for depriving the defendant of his ability to retain counsel. As the Solicitor General would have it, the defendant's quandary stems from the "attorney's private decision to refuse to accept the employment in light of the defendant's financial circumstances—circumstances that in turn are attributable to the defendant's commission (or alleged commission) of acts that give rise to forfeiture" (Br. in Opp. 17). But the defendant's "financial circumstances" result, not from the laws of nature or economics, but from the Government's decision to seek forfeiture

[4] Assets potentially subject to forfeiture thus differ from the proceeds of a bank robbery (Br. in Opp. 19), since the bank's claim, unlike the Government's, is not based on a penal statute. Assets subject to forfeiture likewise differ from "several million dollars' worth of marijuana" (*ibid.*), since no defendant can have legal title to contraband.

of his assets—a decision that rests entirely in the discretion of the prosecutor. As the Government grudgingly concedes in its parenthesis, moreover, the defendant's forced indigency arises from the prosecutor's *allegations* of criminal conduct, not its proof. In short, it is only by attempting to play Pontius Pilate, disclaiming any responsibility for the defendant's impecuniousness, that the Government can avoid addressing the balancing of interests called into play by the "Sixth Amendment presumption in favor of counsel of choice" (*Wheat*, 56 U.S.L.W. at 4443).

Finally, the Government is on weak ground when it embraces the Fourth Circuit's notion that "'[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture.'" Br. in Opp. 20 (quoting Pet. App. 21a). Public confidence in the judicial system is far more likely to be impaired by the spectacle of defendants' being purposefully rendered indigent by the Government before trial, particularly where the circumstances suggest that forfeiture claims are being used selectively to remove unusually competent adversaries. As this Court observed in *Wheat*, trial judges must be alert to the possibility that "the government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side" (56 U.S.L.W. at 4444). A cardinal value of the Sixth Amendment is that "legal proceedings appear fair to all who observe them" (*id.* at 4443). A system that affords the Government "the discretion to restrict the resources available to its opponent to contest the very allegations at issue" is unlikely to seem fair either to the citizenry or to the

bar, for it "is no longer an adversarial system within the rubric of our American tradition" (ABA Am. Br. 12).

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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